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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, \$2.50 PER YEAR. 35 CENTS PER NUMBER

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NOTE AND COMMENT

ANTI-TRUST ACT—DISCRIMINATION IN FAVOR OF CERTAIN CLASSES—EXEMPTION OF LABOR ORGANIZATIONS.—Reference was made in a recent number (1 MICHIGAN LAW REVIEW, 218) to the decision of the supreme court of the United States in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, wherein an anti-trust statute of Illinois was held to be invalid because of a provision exempting certain classes of persons from its operation. Since that case was decided, the supreme court of Nebraska, in *Cleland v. Anderson* (1902), 92 N. W. Rep. 306, has had before it a somewhat similar question arising under a statute of that state, and reached a different conclusion. This fact is the more interesting because in the United States circuit court for the district of Nebraska, McPherson, D. J., had previously held the Nebraska statute invalid for reasons similar to those applied in the *Connolly* case: *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. Rep. 816.

The statute of Nebraska. (Comp. Stat. 1901, ch. 91a. § 5336,) defined a trust, in substance, to be a combination of capital, skill or acts by any person or persons to fix the price of any article or commodity of trade, use or merchandise with the intent to prevent others from carrying on the same business or selling or dealing in the same articles, or a combination of capital, skill or acts, for any or all of the following purposes: (1) To create or carry out restrictions in trade. (2) To limit or reduce the production, or increase or reduce the price of merchandise or commodities. (3) To prevent competition in insurance or in manufacture, making, constructing, transportation, sale or purchase of merchandise, produce or commodities. (4) To fix any standard or figure whereby the price to the public of any article of merchandise, produce or manufacture of any kind intended for use, sale or consumption, should be

in any manner controlled or established. (5) To make or carry out any contract not to sell, dispose of or transport any article of merchandise or commodity or article of trade, product, use, merchandise, consumption or commerce, below a certain figure, or to keep the price at a fixed figure, or establish or settle the price of any such article or commodity, or to make or carry out any contract to preclude or having a tendency to preclude free and unrestricted competition among themselves or others in the production, sale or transportation of any such article of merchandise, product or commodity, or to so pool, combine or unite any interest they may have in such sale, production or transportation that its price may in any manner be affected thereby.

Penalties for the violation of the act are prescribed and various provisions made for its enforcement; and by section 9, it is declared that "Nothing herein contained shall be construed to prevent any assemblies or associations of laboring men from passing and adopting such regulations as they may think proper in reference to wages and the compensation of labor, and such assemblies and associations shall retain and there is hereby reserved to them all the rights and privileges now accorded to them by law, anything herein contained to the contrary notwithstanding."

In a prosecution under this act, it was contended that the statute was unconstitutional because, by the insertion of section 9, the statute was made partial and arbitrary in its application. The court conceded that unless some fair and reasonable foundation for the exemption could be found, the act must fail, saying: "Hence the question to be determined is whether the exception contained in section 9 of the act under consideration is arbitrary and without sound reason, arising from the situation and circumstances of the subject of the legislation (*Association v. Drummond*, 49 Neb. 205, 68 N. W. 375), or based on a reasonable and just view of the subject-matter, and the different conditions it presents. *Wenham v. State*, — Neb. —, 91 N. W. 421. Applying these principles, and bearing in mind that all doubts are to be resolved so as to uphold the enactments of the legislature, if possible, we think the statute is constitutional and valid. In its letter and spirit, it refers only to combinations and conspiracies of persons engaged in the manufacture, sale, and transportation of goods, wares, and merchandise, to prevent or hinder competition, and regulate and control prices. No express exception of organizations of laborers, intended to maintain or advance wages, was necessary to exempt them from its operation. The section in question is inserted, rather, out of abundance of caution, to prevent judicial extension of the terms of the act beyond its scope and purpose than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor, and the skill and labor which produce them, is manifest and reasonable. The statute does not say that laborers who have goods, wares, or merchandise, the product of labor, for sale, may combine to advance or control the price but only that the law designed to prevent combinations in restraint of trade in such articles, when produced, shall not be construed to affect organizations formed to regulate the wages or compensation of the labor and skill which produce them. This distinction is suggested in *Downing v. Lewis*, 56 Neb. 386, 389, 76 N. W. 900. In that case it was held that a laundry was not within the purview of the statute under consideration. It is pointed out very aptly that the business of a laundry is 'to make clothes clean, rather than to make clean clothes.' In other words, it sells no goods or wares. It merely bestows labor and skill upon them. The purpose of the statute, as

stated in that case, is 'to prevent manufacturers and dealers in articles of commerce from combining for the purpose of lessening competition, regulating production, and increasing profits.' Labor and skill are not articles of commerce,—at least not in the same sense as the articles thereby produced; and we think the classification which distinguishes them, and provides for a diversity of legislation with respect to them, is reasonable and proper. The decisions to which we have been referred by counsel do not conflict with this view. In *Low v. Printing Co.*, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670, a statute regulating the hours of labor excepted certain kinds of laborers from its operation. The court held that classification for legislative purposes must have some reasonable basis, and that the exemption in question was arbitrary and unreasonable. It will be seen that the exemption in that case applied clearly to persons who would otherwise have fallen within the purview of the statute. The scope and purpose of the act was to regulate the hours of labor, but laborers engaged in certain kinds of work were excepted. In *Connolly v. Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. —, the statute under consideration exempted agricultural products or live stock, while in the hands of the producer or raiser, from the operation of a statute against combinations in restraint of trade. Here, again, the classification was arbitrary and unreasonable. One set of persons might, while others might not, combine to fix the price of precisely the same article. Persons producing and selling ordinary articles of commerce were not allowed to combine, while those who sold agricultural products or live stock, if raised by themselves, might do so. In the case at bar the statute applies equally to all kinds of goods and products, and the exception relates only to a matter not within the general scope of the act, which is not necessarily reached by its language, nor covered by its intent, even without the section here in question. In *Niagara Insurance Co. v. Cornell*, 110 Fed. 816, 825, the federal circuit court for this district reached the opposite conclusion [with reference to this same statute.] The discussion of this point (page 825) is very brief, and is based on *Low v. Printing Co.*, supra. The court says: 'Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men, practically under the same circumstances, to do another, but like, thing.' This is true, but the application made seems to us superficial. It assumes the whole issue. Statutes are not to be set aside lightly, and we are unable to concur in the view which the federal court has taken."

There are some differences between the Nebraska statute and the Illinois act which was before the supreme court of the United States, but they can scarcely be deemed material. Two questions naturally suggest themselves respecting the Nebraska act: *First*. Are regulations fixing the price of labor fairly within the terms of the act? Do they "create or carry out restrictions in trade"? Do they "limit or reduce the production or increase or reduce the price of merchandise or commodities"? Do they "prevent competition in manufacture, making, constructing, transportation, sale or purchase of merchandise, produce or commodities"? Do they "fix any standard or figure whereby the price to the public shall be in any manner controlled or established upon any article of merchandise, produce or manufacture of any kind intended for use, sale or consumption"? Do they result in making or enforcing "any contract, obligation or agreement of any kind or description by which they bind themselves not to sell, dispose of, traffic in or transport any article of merchandise or commodity or article of trade, product, use, merchandise, consumption or commerce, below a common standard figure, or

agree in any manner to keep the price of such article, product, commodity or transportation at a fixed price, or in any manner establish or settle the price of any article of merchandise, commodity, . . . between them or between themselves and others"? Are their agreements such "the tendency of which is to prevent or preclude a free and unrestricted competition among themselves or others or the people generally in the production, sale, traffic or transportation of any such article of merchandise, product or commodity"? Do they thereby so "agree to pool, combine or unite any interest they may have in connection with the sale, production, or transportation of any such article of merchandise, product or commodity or the carrying on of any such business, that its price might in any manner be affected thereby"? *Second.* Where the policy of the state is to strike down trusts and monopolies, and legislation is aimed at certain of them, is it an unfair, unreasonable and illogical discrimination to except labor trusts and agreements to fix and maintain the price of labor, and to prevent competition among themselves, if not with others, in an indispensable ingredient of all such articles of merchandise, produce or manufacture?

Both of these questions, the supreme court of Nebraska answers in the negative, on the ground that "labor and skill are not articles of commerce—at least not in the same sense as the articles produced; and . . . the classification which distinguishes them and provides for a diversity of legislation with respect to them, is reasonable and proper."

The United States circuit court, by McPherson, District Judge, gives a different answer: "By saying that associations of laboring men are exempt from the provisions of the statute, it is thereby stated, in meaning, that unorganized labor must pay the penalties of a criminal statute for an act done by a member of an organization and by him done with impunity. On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to organized labor—farmers, merchants, professional men, laborers, as well as all others. They are amenable, and, by this statute, that is called 'equal protection.' I do not believe it. Such legislation has been denounced by the supreme court of Nebraska: *Low v. Printing Co.* 41 Neb. 127, 59 N. W. 362. Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men, practically under the same circumstances, to do another, but like, thing."

PREFERENCES ARISING FROM TRUST RELATIONS.—Under this title, in a former number of the REVIEW, what has been called the modern doctrine in regard to the tracing of trust funds was examined, and an attempt was made to explain the extent and the limitations of the doctrine as apparently fixed by the decided trend of recent authority. MICHIGAN LAW REVIEW, VOL. I, No. I, p. 1. It was there shown that the old rule that required specific identification has been so far modified that the equity of the *cestui que trust* may be preserved, and his priority of right over other creditors sustained in case of the insolvency of the trustee, even where there has been a confusion of the trust funds with the trustee's own property, provided the property impressed with the trust, or that which represents it in the way of proceeds, forms a